Kerajaan Malaysia v Global Upline Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01(C)(W)-5–01 OF 2015 AND W-01(C)(W)-6–01 OF 2015
DAVID WONG, UMI KALTHUM AND HASNAH HASHIM JJCA
28 OCTOBER 2016

Contract — Building contract — Performance — Contractor claimed it was entitled to certificate of practical completion and return of half the performance bond for having substantially completed agreed works — Employer took view works not completed according to terms of agreement — 'Substantial' or 'practical' completion not defined under agreement — Contractor relied upon personal calculation of its contract manager to say contract 98.81% completed — Evidence of manager not supported by another other oral or documentary evidence — Whether terms of agreement prevailed over contractor's failure to prove 'substantial completion'

The Malaysian Government ('the appellant') had engaged Global Upline Sdn Bhd ('the respondent') to carry out upgrading works on the Kota Kinabalu International Airport in Sabah ('the project'). The contract was contained in a principal agreement ('PA') and a supplementary agreement ('SA') between the parties. The SA extended the completion dates for each of the three sections under the project. The extended completion date for Section 1 was 30 April 2012. The respondent contended that since it had substantially completed the Section 1 works, the appellant was contractually bound to issue a certificate of practical completion ('CPC') and return half of the RM36m performance bond it had secured in the appellant's favour. The appellant, however, took the position the respondent had not completed the Section 1 works as agreed and it issued a certificate of non-completion ('CNC'), listed out the works that remained uncompleted as at 30 April 2012 and gave notice of liquidated and ascertained damages ('LAD') payable by the respondent. The respondent sued the appellant in the High Court claiming the latter had breached the terms of the contract and was wrong to have imposed LAD. The respondent also sought repayment of the entire performance bond sum on the ground it had validly terminated the PA and SA on 7 June 2012 and was no longer bound by them. To show it had 'substantially completed' the Section 1 works, the respondent relied on the evidence of its contract manager, PW2, who had computed that 98.81% of the works had been completed as at 23 April 2012. The respondent also relied upon the fact the airport was operational on a 24-hour basis from 1 May 2012 to show substantial completion. The appellant submitted that the Section 1 works had not been completed to the satisfaction of the project director ('PD') as agreed under cl 48.2 of the PA which stated 'When the whole

of the Works have reached practical completion according to the provisions of this Contract and to the satisfaction of the PD, the date of such completion shall be certified by him and such date shall be the date of commencement of the Defects Liability Period as provided in Clause 47 hereof. The certificate issued under this sub-clause shall be referred to as the Certificate of Completion'. The appellant submitted that KLIA Consultancy Services Sdn Bhd ('KLIACS'), which it had appointed to administer and supervise the project, had notified the respondent by letter of the list of uncompleted works as at 30 April 2012 and that as the words 'practical completion' and 'substantial completion' were not defined under the agreements, completion meant completion of all works in accordance with the terms of the PA and SA. The appellant said PW2's evidence that the works had been 98.81% completed was questionable and had to be disregarded and that the airport had been operating on a 24-basis not only after 30 April 2012 but even before that date. Holding that the respondent was not required to achieve 100% completion before issuance of the CPC and that it had successfully shown substantial completion of the Section 1 works to merit its issuance, the High Court partly allowed the respondent's claim. The appellant appealed to the Court of Appeal against the whole of the judgment. The respondent's appeal was against that part of the judgment that dismissed part of its claim.

Held, allowing the appellant's appeal and dismissing the respondent's appeal:

(1) Appendix 11A of the SA described in detail the Sections 1, 2 and 3 works and their dates of commencement and completion. It was expressly stipulated that the whole of the Section 1 works must be completed by 30 April 2012. According to the terms of the SA read together with the PA, substantial completion meant the Section 1 works had to be fully completed before the appellant could issue the CPC. The CPC would be issued only when the PD was satisfied that the whole of the works had reached practical completion according to the terms of the contract (re: cl 48) (see paras 58–60).

(2) KLIACS in their letter dated 18 April 2012 informed the respondent that the AGL works in the proposed handing-over areas were not substantially completed. By a letter dated 27 April 2012, KLIACS further identified the major outstanding works that were uncompleted and not ready for handover in accordance with the contractual milestone date as agreed by the parties. KLIACS notified the respondent that it if failed to respond within a week upon expiry of the completion date of 30 April 2012, CNC would be issued and LAD imposed. The respondent was advised to take the necessary steps to expedite progress to complete the scope of works on the contractual milestone date. A final inspection was done on 1 May 2012 and there were still outstanding works. KLIACS then issued a letter dated 25 May 2012 to the respondent notifying that as at 30 April 2012 it had failed to complete the works as described in Appendix 1

attached to the letter. The outstanding works were all the works under Section 1 (Stage 3). The respondent's witness, PW1, confirmed during cross-examination that the whole of Section 1 was not fully completed. There was no certification by the respondent's own consultant confirming that the Section 1 works were substantially or practically completed (see paras 62–64).

(3) Under the PA, the CPC would be issued when the whole works had reached practical completion according to the terms of the agreement and to the satisfaction of the PD. On the facts and evidence, KLIACS had clearly indicated in its letter dated 28 May 2012 that the CPC could not be considered as the respondent had failed to achieve substantial completion. The burden of proof was on the party seeking the claim to prove the facts. Since the respondent alleged they had substantially completed the works, they bore the burden of proof. PW2 was the maker of the summary but the summary was not supported by any other evidence, oral or documentary. No other witnesses gave evidence to support the calculations he had prepared (see paras 67 & 78–80).

(4) The trial judge failed to give any or adequate consideration to the contemporaneous documentary evidence evidencing the progress of the works. Instead she gave undue weight to the oral evidence of PW2 and the summary of sectional physical progress prepared by him to conclude that the respondent had achieved substantial completion. There was judicial misappreciation of the evidence as a whole. The percentage 98.81% was based on PW2's own computation which was not verified by KLIACS as required by cl 14(2)(b) of the PA nor supported by any documentary proof. The respondent failed to adduce any other documentary evidence to support the claim that it had substantially completed the Section 1 works as envisaged under the PA and SA (see paras 75 & 81).

(5) The fact that the airport was operational on 24-hour basis could not be the basis to determine that the respondent had achieved practical completion as envisaged by the parties when the SA was executed (see para 84).

(6) The respondent had failed to achieve substantial completion and to complete both Sections 2 and 3 works. The trial judge was correct to order the return of the balance 50% of the performance bond (see para 85).

[Bahasa Malaysia summary

Kerajaan Malaysia ('perayu') telah melantik Global Upline Sdn Bhd ('responden') untuk menjalankan kerja penambahbaikan untuk Lapangan Terbang Antarabangsa Kota Kinabalu di Sabah ('projek tersebut'). Kontrak tersebut terkandung dalam perjanjian utama ('PU') dan perjanjian tambahan

('PT') antara pihak-pihak. PT itu telah melanjutkan tarikh siap untuk setiap tiga seksyen di bawah projek tersebut. Lanjutan tarikh siap untuk Seksyen 1 adalah 30 April 2012. Responden menegaskan bahawa oleh kerana ia telah siap sebahagian besar kerja Seksyen 1, perayu terikat secara kontraktual untuk mengeluarkan perakuan amalan siap ('PAS') dan memulangkan separuh daripada bon pelaksanaan RM36 juta yang dijaminkannya bagi pihak perayu. Perayu, bagaimanapun, mengambil kedudukan yang responden tidak menyiapkan kerja Seksyen 1 seperti mana dipersetujui dan ia telah mengeluarkan perakuan tidak siap ('PTS'), yang menyenaraikan kerja yang masih belum disiapkan setakat 30 April 2012 dan memberi notis ganti rugi cair dan tentu ('GCT') yang perlu dibayar oleh responden. Responden telah menyaman perayu di Mahkamah Tinggi dengan mendakwa perayu telah melanggar terma-terma kontrak dan telah salah kerana mengenakan GCT. Responden juga memohon bayaran balik keseluruhan jumlah bon pelaksanaan atas alasan ia telah dengan sah menamatkan PU dan PT pada 7 Jun 2012 dan tidak lagi terikat dengan kedua-duanya. Bagi menunjukkan ia telah 'substantially completed' kerja Seksyen 1, responden telah bergantung kepada keterangan pengurus kontraknya, PW2, yang telah mengira bahawa 98.81% kerja tersebut telah siap setakat 23 April 2012. Responden juga bergantung pada fakta yang lapangan terbang itu beroperasi 24 jam dari 1 Mei 2012 untuk menunjukkan ia siap sebahagian besar. Perayu berhujah bahawa kerja Seksyen 1 tidak menyiapkan menurut kepuasan pengarah projek ('PP') sepertimana dipersetujui di bawah klausa 48.2 PU yang menyatakan 'When the whole of the Works have reached practical completion according to the provisions of this Contract and to the satisfaction of the PD, the date of such completion shall be certified by him and such date shall be the date of commencement of the Defects Liability Period as provided in Clause 47 hereof. The certificate issued under this sub-clause shall be referred to as the Certificate of Completion'. Perayu berhujah bahawa KLIA Consultancy Services Sdn Bhd ('KLIACS'), yang telah dilantik olehnya untuk mentadbir dan mengawalselia projek tersebut, telah memberitahu responden melalui surat tentang senarai kerja yang tidak siap setakat 30 April 2012 dan bahawa seperti kata-kata 'pratical completion' dan 'substantial completion' tidak ditafsirkan di bawah perjanjian, siap bermaksud semua kerja menurut terma-terma PU dan PT. Perayu menyatakan keterangan PW2 bahawa kerja telah siap 98.81% boleh dipersoalkan dan patut tidak diambil kira dan bahawa lapangan terbang itu telah beroperasi 24 jam bukan sahaja selepas 30 April 2012 tetapi malah sebelum tarikh tersebut. Dengan memutuskan bahawa responden tidak dikehendaki mencapai 100% siap sebelum keluaran PAS dan bahawa ia telah berjaya menunjukkan siap sebahagian besar kerja Seksyen 1 untuk mewajarkan keluarannya, Mahkamah Tinggi sebahagiannya telah membenarkan tuntutan responden. Perayu telah merayu kepada Mahkamah Rayuan terhadap keseluruhan penghakiman. Rayuan responden adalah terhadap bahagaian penghakiman tersebut yang telah menolak sebahagian tuntutannya.

Diputuskan, membenarkan rayuan perayu dan menolak rayuan responden:

(1) Lampiran 11A PT menerangkan secara terperinci kerja-kerja Seksyen-Seksyen 1, 2 dan 3 dan tarikh-tarikh mula dan siapnya. Ia dengan jelas menyatakan bahawa keseluruhan kerja Seksyen 1 perlu siap pada 30 April 2012. Menurut terma-terma PT dibaca bersama PU, siap sebahagian besar bermaksud kerja Seksyen 1 telah siap sepenuhnya sebelum perayu boleh mengeluarkan PAS itu. PAS boleh dikeluarkan hanya apabila PP berpuas hati bahawa keseluruhan kerja telah mencapai amalan siap menurut terma kontrak (rujuk: klausa 48) (lihat perenggan 58–60).

(2) KLIACS dalam surat mereka bertarikh 18 April 2012 telah memberitahu responden bahawa kerja AGL dalam cadangan kawasan penyerahan yang tidak siap sebahagian besarnya. Melalui surat bertarikh 27 April 2012, KLIACS selanjutnya mengenal pasti baki kerja utama yang tidak siap dan tidak sedia untuk serahan menurut tarikh penting kontraktual seperti mana dipersetujui oleh pihak-pihak. KLIACS telah memberitahu responden bahawa jika ia gagal untuk menjawab dalam tempoh seminggu selepas luput tarikh siap 30 April 2012, PTS akan dikeluarkan dan GCT dikenakan. Responden telah dinasihati untuk mengambil langkah-langkah perlu untuk mempercepatkan prestasi agar siap skop kerja itu pada tarikh penting kontraktual tersebut. Pemeriksaan akhir telah dilakukan pada 1 Mei 2012 dan masih terdapat kerja belum siap. KLIACS kemudian telah mengeluarkan surat bertarikh 25 Mei 2012 kepada responden memberitahu bahawa setakat 30 April 2012 ia telah gagal menyiapkan kerja seperti yang dinyatakan dalam Lampiran 1 yang dilampirkan kepada surat itu. Baki kerja adalah semua kerja di bawah Seksyen 1 (Peringkat 3). Saksi responden, PW1, telah mengesahkan semasa pemeriksaan balas bahawa keseluruhan Seksyen 1 tidak siap sepenuhnya. Tiada pengesahan oleh perunding responden sendiri yang mengesahkan bahawa kerja Seksyen 1 telah siap sebahagian besar atau praktiknya (lihat perenggan 62–64).

(3) Di bawah PU, PAS akan dikeluarkan apabila keseluruhan kerja telah mencapai amalan siap menurut terma-terma perjanjian dan kepada kepuasan PP. Berdasarkan fakta dan keterangan, KLIACS jelas menunjukkan dalam suratnya bertarikh 28 Mei 2012 bahawa PS tidak boleh dipertimbangkan kerana responden telah gagal mencapai siap sebahagian besarnya. Beban bukti terletak pada pihak yang memohon tuntutan membuktikan fakta itu. Oleh kerana responden mengatakan mereka telah menyiapkan kerja sebahagian besarnya, mereka mempunyai beban bukti. PW2 adalah pembuat ringkasan itu tetapi ringkasan itu tidak disokong oleh apa-apa keterangan lain, secara lisan atau dokumentar. Tiada saksi lain telah memberikan keterangan untuk

menyokong pengiraan yang disediakannya (lihat perenggan 67 & 78–80).

(4) Hakim perbicaraan telah gagal memberikan apa-apa atau pertimbangan mencukupi untuk keterangan sedia ada itu membuktikan prestasi kerja tersebut. Sebaliknya beliau telah memberikan beban yang tidak wajar kepada keterangan lisan PW2 dan ringkasan prestasi fizikal seksyen yang disediakan olehnya untuk membuat kesimpulan bahawa responden telah mencapai keadaan siap sebahagian besarnya. Wujud ketidakfahaman kehakiman berhubung keterangan itu secara keseluruhannya. Peratusan 98.81% adalah berdasarkan pengiraan PW2 yang tidak disahkan oleh KLIACS seperti mana dikehendaki oleh klausa 14(2)(b) PU dan tidak disokong oleh apa-apa bukti dokumentar. Responden telah gagal untuk mengemukakan apa-apa keterangan dokumentar lain bagi menyokong tuntutan itu bahawa ia sebahagian besar telah menyiapkan kerja Seksyen 1 seperti mana terkandung di bawah PU dan PT (lihat perenggan 75 & 81).

(5) Fakta bahawa lapangan terbang itu beroperasi 24 jam tidak boleh menjadi asas untuk menentukan bahawa responden telah mencapai amalan siap seperti yang dipersetujui oleh pihak-pihak apabila PT itu dilaksanakan (lihat perenggan 84).

(6) Responden telah gagal untuk mencapai amalan siap dan untuk menyiapkan kedua-dua kerja-kerja Seksyen-Seksyen 1 dan 2. Hakim perbicaraan adalah betul untuk memerintahkan pulangan baki 50% bon pelaksanaan itu (lihat perenggan 85).]

Notes

For a case on performance, see 3(3) *Mallal's Digest* (5th Ed, 2015) para 4039.

Cases referred to

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)

Hosier and Dickinson Ltd v P & M Kaye Ltd [1970] 1 WLR 1611, CA (refd)

KPM Khidmat Sdn Bhd v Tey Kim Suie [1994] 2 MLJ 627; [1994] 3 CLJ 1, SC (refd)

Masjaya Trading Sdn Bhd v Kedah Cement Sdn Bhd [2004] 4 CLJ 18, CA (refd)

Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka [2014] MLJU 1807; [2014] 9 CLJ 1064, FC (refd)

Westminster City Council v J Jarvis & Sons Ltd and another [1970] 1 All ER 943, HL (refd)

Legislation referred to

Contracts Act 1950 s 40

Evidence Act 1950 s 101

Appeal from: Civil Suit No MT-21C-2–05 of 2013 (High Court, Kuala Lumpur)

Puteri Shehnaz Majid (Sasha Ravindra with her) (Cheah Teh & Su) for the plaintiff.
Ahmad Terrirudin bin Mohd Salleh (Cynthia Noor and Norazlina Razali with him) (Federal Counsel, Attorney General's Chambers) for the defendant.

Hasnah Hashim JCA (delivering judgment of the court):

INTRODUCTION

[1] There were two appeals before us arising from the same suit as follows:

(a) Civil Appeal No W-01(C)(W)-5–01 of 2015; and

(b) Civil Appeal No W-01(C)(W)-6–01 of 2015.

In this judgment, for ease of reference, we will refer the parties in their original capacities in the court below.

[2] The plaintiff was appointed by the defendant to carry out works for the 'Redevelopment of the Kota Kinabalu International Airport, Sabah, Package 2: Airside Infrastructure, Air Traffic Control Tower and New Low Costs Carrier Terminal' ('the project'). The contract sum for the project was RM720,000,000. Subsequently the contract sum was increased to RM773,186,760.75. The agreement between the parties was executed on 1 August 2006 and the period of completion of the project was 36 months from the date of the letter of acceptance dated 21 April 2006 ('the principal agreement').

[3] Due to issues relating to the construction of the precision approach lights for Runway 02, a supplementary agreement ('SA') was executed extending the period of completion for each of the Sections as follows:

(a) Section 1: 30 April 2012;

(b) Section 2: 30 August 2012; and

(c) Section 3: 31 December 2012.

[4] It was the plaintiff's case in view of the fact that they had substantially completed the Section 1 works, the defendant must issue the certificate of practical completion ('CPC') pursuant to cl 48.2 of the principal agreement and release 50% of the performance bond. According to the plaintiff, the failure of the defendant to issue the CPC and release 50% of the performance bond amounting to RM18m to the plaintiff was a clear breach of the principal agreement. It was the plaintiff's pleaded case that the call on the performance

bond by the defendant was wrongful due to the termination of the said agreement on 7 June 2012 by the plaintiff.

[5] The plaintiff filed the claim against the defendant for breach of the terms of the principal agreement for failing to issue the CPC upon the completion of Section 1 works and the imposition of the liquidated ascertained damages ('LAD') in respect of Section 2 works by the defendant was wrongful.

[6] The learned High Court judge partly allowed the plaintiff's claim against the defendant as follows:

(a) a declaration that the defendant had breached the contract in failing to issue the CPC upon the completion of Section 1 works on 30 April 2012 and failing to release 50% of the performance bond;

(b) the defendant to pay RM18m to the plaintiff together with interest at 5%pa from the date of judgment until the date of full settlement;

(c) a declaration that the imposition of LAD against the plaintiff for Section 1 works was wrongful;

(d) a declaration that the imposition of LAD against the plaintiff for Section 2 works was invalid; and

(e) costs of RM70,000 to be paid to the plaintiff.

[7] The learned High Court judge dismissed part of the plaintiff's claims as follows:

(a) RM18m being the balance 50% of the performance bond called and retained by the defendant; and

(b) RM303,000 being a reimbursable claim due to the plaintiff for various environmental impact assessment ('EIA') reports.

[8] The plaintiff appealed against the part of the High Court judgment dismissing their claims whilst the defendant appealed against the whole of the judgment.

[9] We had unanimously allowed the first appeal by the defendant and dismissed the second appeal by the plaintiff with costs. We now set down our reasons for doing so.

MATERIAL FACTS

[10] By the terms of the letter of acceptance the plaintiff was required to furnish to the defendant a performance bond in the sum of RM36m being 5%

of the contract sum. The parties executed the principal agreement on 1 August 2006. The period of completion under the said principal agreement was 36 months commencing from 1 April 2006. The date of completion as stipulated in the aforesaid agreement was 20 April 2009. KLIA Consultancy Services Sdn Bhd ('KLIACS') was appointed by the defendant as its representative for the purposes of administering and supervising the project works.

[11] There was a delay in the completion of the project resulting in five extensions of time ('EOT') granted to the plaintiff to complete the whole of the works under the principal agreement thus, changing the original date of completion:

(a) EOT Certificate No 1 extension until 15 December 2009;

(b) EOT Certificate No 2 extension until 19 May 2010;

(c) EOT Certificate No 3 extension until 1 July 2010;

(d) EOT Certificate No 4 extension until 18 March 2011; and

(e) EOT Certificate No 5 extension until 30 April 2012.

[12] The plaintiff completed the works and handed over to the defendant before the extended completion date of 30 April 2012 as follows:

(a) the low cost carrier terminal building was completed and handed over on 10 January 2007;

(b) the Department of Civil Aviation ('DCA') Administration building was completed and handed over on 2 September 2008;

(c) the Air Traffic Control Tower building, its facilities and part of the apron was handed over 2 February 2009;

(d) the Doopler VHF Omnidirectional Range ('DVOR') and Distance Measuring Equipment ('DME') was handed over on 1 September 2009; and

(e) Taxiway Lima, Golf, Charlie and part of the apron completed and handed over on 20 October 2011.

[13] The defendant also issued five taking over certificate ('TOC') when the works valued at RM137,505,858.24 were completed.

[14] There were, however, issues with regards to the design requirements under the principal agreement for the construction of the precision approach lights ('PAL') for Runway 02. A section of the PAL had to be constructed offshore. The initial proposed method of construction was by way of a piling barrage to construct the offshore platforms in order to hold the PAL. However,

due to shallow water levels dredging works had to be implemented. Due to the proposed dredging the Environmental Protection Department of Sabah ('EPD') required a supplementary environmental impact assessment ('EIA') report and a hydraulic study to be undertaken and submitted for approval before any works could commence. The EPD later granted permission to the plaintiff to conduct a hydraulic study to supplement the earlier EIA. The plaintiff appointed DHI Water and Environment (M) Sdn Bhd to conduct the said hydraulic study.

[15] The EPD directed that a more environmentally friendly method be used that would not involve any form of dredging. An alternative construction method by temporary staging was proposed by the plaintiff. This method was approved by the EPD. However, this alternative construction method involved an additional costs of RM15,291,838. Since this method involved substantial additional cost the defendant's approval was required before any work could commence.

[16] At a meeting held on 17 January 2012 the parties agreed that a supplementary agreement ('SA') be executed to include the construction of the offshore PAL. The plaintiff informed the defendant that the time for completion would be eight months as the works involved three sections. It was also agreed that the completion date for the works under Section 1 would be the extended completion date (ie 30 April 2012).

[17] The salient terms of the SA dated 13 March 2012 were as follows:

(a) the defendant to pay the plaintiff a sum of RM11,762,662 ('the SA sum') for the alternative construction method for the PAL;

(b) Section 1 must be completed by 30 April 2012;

(c) LAD for any delay of Section 1 works was agreed at 0.015% of the contract sum per day; and

(d) Section 2 must be completed on 31 August 2012. LAD for any delay was agreed at 0.015% of the contract sum per day.

[18] The defendant then issued a certificate of non-completion ('CNC') dated 25 May 2012 for Section 1 together with the list of the outstanding works as at 30 April 2012 as per Appendix 1. On 7 June 2012 the plaintiff terminated the principal agreement and the SA.

[19] It is the plaintiff's pleaded case that they had achieved practical or substantial completion of the works under Section 1 as described in Appendix 11A of the SA on 30 April 2012. It was argued by the plaintiff that since they had completed 98.81% of the works as at 23 April 2012 the defendant should

have issued the certificate of practical completion ('CPC') and release 50% of the performance bond. Furthermore, the Kota Kinabalu International Airport was already operational on a 24-hour basis. The defendant was in breach of the agreement for failing to issue the CPC and failing to release 50% of the performance amounting to RM18m to the plaintiff.

[20] The plaintiff contended that the defendant had held out or represented that it would issue the CPC and release the 50% bond of the performance bond to the plaintiff upon the completion of Section 1 works.

[21] Dissatisfied the plaintiff filed the claim against the defendant and sought the following reliefs:

(a) a declaration that the defendant is in breach of contract in failing to issue the CPC upon completion of Section 1 works on or around 30 Arpil 2012;

(b) a declaration that the imposition of LAD for Section 1 and Section 2 works by the defendant is wrongful and invalid and amounts to a penalty;

(c) special damages of RM36m being the performance bond sum;

(d) alternatively, judgment against the defendant for the return of such amount of the performance bond called upon in excess of the value of incomplete works under the contract;

(e) special damages of RM554,880 being a reimbursable claim due to the plaintiff for the various EIA studies/reports;

(f) special damages for loss of profits in the sum of RM6,724,493.10;

(g) general damages to be assessed;

(h) interest at 5%pa on prayer (iii) from 1 May 2012 to the date of full settlement;

(i) interest at 5%pa on prayer (iv) from 9 January 2013 to the date of full settlement;

(j) interest at 5%pa on prayer (v) from date of writ to the date of full settlement;

(k) interest at 5%pa on prayer (vi) from date of writ to the date of full settlement; and

(l) costs.

[22] The defendant contended that based on the terms of the principal agreement and the terms of the SA the plaintiff had failed to substantially

A complete the works to the satisfaction of the project director ('PD'). In order to achieve substantial completion the whole of the works as described in Appendix 11A, Schedule C of the SA must be completed.

THE GROUNDS OF APPEALS

B

[23] The principal grounds of appeal for both the appeals in the appeal by the defendant against the decision of the learned judge were as follows:

(a) the High Court judge erred in holding that the plaintiff had substantially completed Section 1 works by 30 April 2012 as the airport was operational on a 24-hour basis beginning 1 May 2012;

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(b) the High Court judge erred in holding the defendant was in breach of the agreement for failing to issue the CPC and to release the 50% of the performance bond the plaintiff;

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(c) the High Court judge had erred in failing to consider that Section 1 of the works did not achieve practical completion to the satisfaction of the PD as provided in cl 48.2 of the agreement;

E

(d) the High Court judge erred in holding that the failure to carry out testing and commissioning was not a material issue in the certificate of non-completion ('CNC'); and

(e) the High Court judge erred in holding that the LAD imposed on the plaintiff in respect of Section 1 was wrongful and the LAD imposed on Section 2 works was invalid as no loss was proven.

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[24] The principal grounds of appeal by the plaintiff were as follows:

(a) the learned High Court judge's ruling on the termination was inconsistent with her finding that the defendant was in breach of the contract. Her Ladyship had failed to consider the plaintiff's right under s 40 of the Contracts Act 1950 to terminate the contract despite holding that the defendant was in breach;

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(b) the High Court judge failed to take into consideration the contemporaneous documents before the court evidencing the plaintiff's termination;

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(c) the High Court judge failed to hold that the plaintiff had terminated the contract on 7 June 2012 and was therefore released from all further obligations under the contract;

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(d) the High Court judge erred in holding that the plaintiff was responsible for the costs of procuring the EIA reports as the contract was a design and build contract and had failed to consider the provisions of the contract; and

(e) the High Court judge erred in holding that the method of construction was entirely up to the plaintiff and therefore the plaintiff is responsible for the related costs.

THE PLAINTIFF'S SUBMISSION

[25] Learned counsel for the plaintiff submitted that by a letter dated 23 May 2012 the plaintiff had applied, albeit direct to the Minister, for the CPC to be issued and the performance bond to be reduced by 50%. The plaintiff had forwarded to KLIACS the progress records to KLIACS on 25 May 2012 notifying that 99.36% of Section 1 works were completed.

[26] The defendant then issued a CNC vide a letter dated 25 May 2012 and listed the outstanding works as at 30 April 2012. LAD of RM2,598.34 per day was imposed commencing on 1 May 2012. The plaintiff terminated the agreement by a letter dated 7 June 2012. It was argued by learned counsel for the plaintiff that the defendant did not deny this in its defence and this was not challenged at all in the cross-examination of the plaintiff's witnesses.

[27] Subsequently the defendant then issued a CNC in respect of the Section 2 works on 4 October 2012 and imposed LAD of RM4,362.74 per day commencing 1 September 2012. The plaintiff received a notice of intention to terminate dated 10 December 2012 for failing to complete the Section 1 and Section 2 works within the period stipulated in the SA.

[28] The plaintiff denied the allegations by the defendant. As a result of the defendant's breaches, in particular the failure to issue the CPC upon the completion of Section 1 works, the plaintiff was discharged from its obligations under the principal agreement.

The wrongful call on the performance bond

[29] The plaintiff argued since the plaintiff had terminated the agreement they were entitled to the balance of the performance bond. As a result of the breach by the defendant the plaintiff had no other alternative but to terminate the agreement discharging themselves from any of the obligations under the agreement.

[30] The plaintiff argued that the High Court judge had erred when she held that the defendant's call on the performance bond was not wrongful despite the evidence before Her Ladyship that the plaintiff had terminated the agreement.

[31] Learned counsel for the plaintiff submitted that the termination of the agreement by the plaintiff was deemed to be an accepted fact as it was not

challenged by the defendant. None of the plaintiff's witnesses were cross-examined on this issue and it must therefore be taken that that the defendant had abandoned its case on this issue.

[32] It is further submitted that since the agreement does not contain any provisions on termination the plaintiff is entitled to rely on its common law right to terminate the agreement. Section 40 of the Contracts Act 1950 provides that if a party refused to '... perform his promise in its entirety, the promise may put an end to the contract unless he has signified, by words or conduct, his acquiescence in its continuance'.

[33] The plaintiff argued that failure to issue the CPC and release the 50% of the performance bond upon the completion of Section 1 works was in essence a repudiation of the agreement. The failure to issue the CPC is a fundamental breach going to the root of the agreement and the plaintiff is entitled to terminate the agreement.

[34] In the case of *Masjaya Trading Sdn Bhd v Kedah Cement Sdn Bhd* [2004] 4 CLJ 18 the plaintiff gave expressed notice that it would cease construction activities and determine the agreement if LAD was deducted in the interim payment. The plaintiff validly terminated the agreement and was not bound to perform any of its obligations under the said agreement. The call on the performance bond was therefore wrongful. Similarly, in this appeal the plaintiff had validly terminated the agreement and was not bound to perform any of its obligations under the principal agreement and SA.

The claim for the costs of the EIA reports

[35] The plaintiff argued that the amount of RM303,000 incurred in respect of the various EIA reports ought to be borne by the defendant and the plaintiff ought to be reimbursed. Four EIA reports were prepared:

(a) EIA for the proposed sea reclamation;

(b) EIA for the proposed obstruction clearance;

(c) supplementary EIA for the proposed obstruction clearance (blasting activity); and

(d) supplementary EIA for the proposed sea reclamation ('PAL').

[36] The defendant had notified the plaintiff that the expenses in relation to the EIA studies were to be borne by the plaintiff in accordance to the terms of the agreement. The defendant disputed the liability but not the sum.

[37] The plaintiff submitted that it is the defendant's responsibility to procure the main EIA report for the construction of the airport. It was argued by learned counsel for the plaintiff that cl 8.7 of the agreement was not relevant as it does not deal with the costs of procuring EIA reports. The words '... adequacy, suitability, appropriateness, stability and safety of all site operations and methods construction ...' does not include or extend to the costs of EIA reports.

[38] It was also submitted that the learned judge failed to consider the testimony of DW1 that the plaintiff were a design and build contractor in name only and that KLIACS must give its approval before the plaintiff can proceed with the works as provided in cl 7.2.

Practical and substantial completion of Section 1 works

[39] The learned High Court judge made a finding of fact based on the evidence before her that the plaintiff had achieved practical completion of Section 1 works on 30 April 2012. Clauses 43 and 48 of the principal agreement do not require 100% completion of the Section 1 works. All that was required was substantial or practical completion. As at 30 April 2012, 98.81% of the Section 1 works were completed. The plaintiff relied on the summary of sectional physical progress of Section 1 works as at 30 April 2012 prepared by PW2 (Encik Ismail Jusoh), their contract manager/quantity surveyor. According to PW2 as at 21 May 2012 98.81% of Section 1 works was completed. The format applied by PW2 was reasonable and fair in view of the construction that has given to what is meant by Section 1 works and the whole works. PW2's evidence was not challenged, contradicted or eroded by the defendant. The High Court judge had accepted the figures as correct and found that PW2 was not seriously cross-examined on his methodology and the correctness of his calculations of the level of completion.

[40] Furthermore, KLIACS had listed only two outstanding works, that is, the Apron Taxiway and the Aeronautical Ground Lighting ('AGL').

Clause 48.2

[41] There was no evidence either orally or documentary that the PD was satisfied that the Section 1 works had achieved practical completion. The plaintiff had applied for the issuance of the CPC vide its letter dated 23 May 2012 but KLIACS refused to issue the CPC on the ground that Section 1 works were not completed.

[42] Clause 48.7 of the principal agreement was not applicable as it dealt with the consequences of failure to pass commissioning tests. The provision only applies to instances where the works or any part thereof fails to pass the commissioning tests under cl 37A.5.

Testing and commissioning not required for substantial completion of Section 1 works

[43] The testing and commissioning can only be implemented when the whole of the AGL works under Sections 1, 2 and 3 have been completed. The High Court judge was correct when she accepted the plaintiff's explanation. The testing and commissioning is to be carried out after all the three Sections have been completed and there was no rebuttal evidence by the defendant on this issue.

The Kota Kinabalu International Airport was operational on a 24-hour unrestricted basis

[44] Learned counsel for the plaintiff submitted that since the Kota Kinabalu International Airport was operational on a 24-hour unrestricted basis beginning 1 May 2012, it was clear evidence that Section 1 works was practically completed.

THE DEFENDANT'S SUBMISSION

Breach of contract

[45] It was argued by the learned senior federal counsel ('SFC') for the defendant that the High Court judge erred in holding that the defendant was in breach when it did not issue the CPC and release the 50% performance bond to the plaintiff. The whole of the works must be completed in order for the CPC to be issued pursuant to cl 48.2. The CPC would have been issued on 30 April 2012 if the plaintiff had practically completed Section 1 works. However, Section 1 works were not practically completed as required by the terms of the principal agreement and the SA.

[46] Learned counsel for the defendant submitted that before a CPC could be issued the works as described in Section 1 of the SA the PD must be satisfied that the works completed was in accordance with the terms and conditions of the principal agreement as provided under cl 48.2. KLIACS in its letter dated 25 May 2012 had listed the outstanding works as at 30 April 2012 and this fact was confirmed by the plaintiff's own witness, PW1.

[47] The plaintiff failed to fully complete one of the main components of the said project. The works under package 2 consists of Air Side Infrastructure, Air Traffic Control Tower and New Low Cost Carrier Terminal. The Air Side Infrastructure includes Section 1 works which included the AGL works and the rehabilitation of the existing taxiways as well overall works at the Apron taxiway. The plaintiff failed to replace the existing cables. PW1 confirmed during cross-examination that as at 1 May 2012 the Kota Kinabalu International Airport was still using the existing cables and fittings when it should have been replaced. Therefore, the plaintiff had failed to complete the Section 1 works by 30 April 2012 as agreed.

[48] It was further submitted that under the principal agreement there was no definition of the words 'practical' and 'substantial completion'. In the absence of a definition for practical completion and substantial completion, completion would amount to a reference to completion of all the works in accordance to the terms of the principal agreement and the SA.

[49] Learned SFC further submitted that although five EOT were issued it did not mean that the plaintiff had completed all the works in the said Section 1. The defendant's witness, DW2 explained that the project was a big project and since the Kota Kinabalu International Airport is a busy airport certain sections of the project must be completed and taken over first. Taking over certificate ('TOC') must be distinguished from CPC which will only be issued when the total works of the project have been completed.

[50] Learned SFC submitted that the evidence of PW2 that the works was 98.81% completed was questionable and should be disregarded.

[51] With regard to the issue that the airport was operational on 24-hour basis from 1 May 2015, the defendant submitted that the airport was already operating on a 24-hour basis even before 30 April 2012. The project was a redevelopment project on an existing airport therefore the 24-hour operation of the said airport was operating with the existing infrastructure and equipment.

[52] The release or refund of the performance bond is subject to the due completion of the aforesaid works.

THE FINDINGS OF THE HIGH COURT

[53] In the course of her judgment the learned trial judge made, inter alia, the following salient findings on the evidence before her:

(a) the CPC may be issued even if the works were not completed or have not even been commenced;

(b) the plaintiff had substantially completed the works by the due date of completion. The outstanding works do not affect the required works which had been substantially completed as there are either minor and/or are not due as they form or are related to Sections 2 and 3;

(c) the format adopted by the plaintiff to calculate the level of completion was reasonable and fair;

(d) under the terms of the agreement the plaintiff was not required to achieve full or 100% completion. CPC may be issued when there is substantial completion;

(e) the plaintiff achieved substantial completion of Section 1 works on 30 April 2012 to merit the issue of CPC and the release of the 50% of the performance bond. The reopening of the airport to operate on a 24-hour unrestricted basis was approved by DCA and MASB;

(f) the defendant was entitled to make the call on the bond as it was to offset the LAD. The defendant was not entitled to forfeit the sum for want of proof; and

(g) the balance of the bond to be retained for a period of 12 months after the end of the defects liability period.

DECISION

[54] An appellate court will not intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion and where there has been insufficient judicial appreciation of the evidence. Justice Raus Sharif (President of the Court of Appeal) elucidated that the appellate court will intervene in a case where the trial court has so fundamentally misdirected itself (*Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka* [2014] MLJU 1807; [2014] 9 CLJ 1064). The Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453 reiterated the principle to be adopted by an appellate court when reversing findings of fact by a trial court:

> ... It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin & Anor (P) v Lee Ing Chin @ Lee Teck Seng & Anor* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (at p 10) per Steve Shim CJ SS. More recently this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Berhad v Genisys Integrated Pte ltd* [2010] 9 CLJ 785 where it was held at p 800:
>
> > It is well-settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly

wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *Chow Yee Way & Anor v Choo Ah Pat* [1978] 1 LNS 32; *Watt v Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2004] 4 CLJ 309.

[55] Therefore, the failure to consider the entirety of the evidence and material issues or the failure to make findings of fact or the making of bare findings of fact will invite appellate intervention. Such omissions by a trial judge will require the appellate courts to take on the role of first instance judge and review the evidence in its entirety afresh.

[56] Having set out the legal principles underlying appellate intervention, we turn to the facts of the present case.

The SA

[57] The parties entered into a principal agreement and subsequently the SA was executed to facilitate the completion of delayed project. In order to comply with the supplementary EIA study the plaintiff proposed an alternative method of construction by using a temporary staging to mobilise piling frame approved by EPD. The method proposed was more environmental friendly to protect the shoreline. Since the aforesaid method proposed involved modification of construction method for the offshore PAL at Runway 02 the SA was executed setting out the terms of the modified construction works. It was agreed that the SA would be supplemental to the principal agreement and to be read and construed as part of the said agreement. It was agreed under the SA that the defendant will pay the plaintiff an additional amount of not more than RM11,72,662.

[58] Appendix 11A SA described in detail the Sections 1, 2 and 3 works, the date of commencement and the date of completion:

Section	Descriptions	Date of commencement	Date of completion	Liquidated and ascertained damages ('LAD')
1.	The whole of the works (excluding the Section 2 works and Section 3 works described hereunder)	As per the letter of acceptance	30 April 2012 (latest extended date for substantial completion)	0.015% of the contract sum per day

2.	Runway 20 with and including precision approach light portion (hereinafter referred to as the 'Section 2 works')	As per the letter of acceptance	31 August 2012	0.015% of this supplementary agreement sum per day
3.	Precision approach light for Runway 02 at the offshore portion (hereinafter referred to as the Section 3 works.		31 December 2012	0.015% of this supplementary agreement sum Per day

[59] It was expressly stipulated that the whole of the Section 1 works must be completed on 30 April 2012. Appendix 11A of the SA provided that the latest extended date for substantial completion was 30 April 2012. The learned High Court judge concluded that the plaintiff had successfully achieved substantial completion of Section 1 works based on the percentage as calculated by the plaintiff. The plaintiff through its witness, PW2, gave evidence that they had achieved 98.1% completion of Section 1 works and 94.17% of the whole works.

[60] According to the terms of the SA read together with the principal agreement substantial completion meant the Section 1 works must be fully completed before the defendant can issue the CPC. The CPC will be issued only when the PD was satisfied that the whole of the works have reached practical completion according to the terms of the contract (re: cl 48). Clause 43 of the principal agreement provided that the works shall be substantially completed by the date for substantial completion.

[61] The Section 1 works were as follows:

(a) extended runway, southern parallel taxiway and reconstruction of Runway 02 (CH2830-CH2988);

(b) wxisting taxiway Alpha, Foxtrot and Juliet;

(c) new taxiway Delta, Ehco and Nothern Parallel taxiway (CH1850-CH900);

(d) three layer of runway overlay work (CH2830 to CH750);

(e) overlay works at T1 and T2 Apron Taxiways;

(f) AGL works for stage 3;

(g) 12 nos of natural obstruction lights;

(h) M&E works for stage 3;

(i) drainage system and pump stations with automatic operation; and

(j) all security fencing, gates and turfing.

[62] KLIACS in their letter dated 18 April 2012 informed the plaintiff that the AGL works in the proposed handing over areas were not substantially completed. By a letter dated 27 April 2012 KLIACS further identified the major outstanding works that were uncompleted and not ready for handover in accordance with the contractual milestone date as agreed by the parties:

Runway Overlay (CH2830 to CH 750,2080m length)

1. 3rd layer of runway overlay work (main runway section)
2. 3rd layer of runway overlay work (both side shoulder)

Rehabilitation of Existing Taxiway Alpha

1. Taxiway rehabilitation works & shoulder widening
2. M & E pipe crossing for HT cable and AGL fibre optic

Overlay works at Apron Taxiway

1. Terminal 1 (Bay 4 to Bay 6)
2. Terminal 2

Overall AGL works for Section1 works

1. Installation of RCMS and fibre optic cable complete with T&C
2. Primary cable laying for existing Runway and Taxiway Echo
3. Installation of AGL new fittings for existing Runway, Taxiway Echo and Alpha

HT Reticulation Works for Section 1 Works

1. PS3 to CUB T1 (VO Works)
2. PS1 to CUB T2
3. CUB T2 to PS2.

[63] KLIACS notified the plaintiff that if they fail to respond within a week upon the expiry of the completion date of 30 April 2012 CNC would be issued and LAD imposed. The plaintiff was advised to take the necessary steps to expedite progress to complete the scope of works on the contractual milestone

date. A final inspection was conducted on 1 May 2012 and there were still outstanding works. KLIACS then issued a letter dated 25 May 2012 to the plaintiff notifying that as at 30 April 2012 the plaintiff had failed to complete the works as described in Appendix 1 attached to the letter. The outstanding works were all the works under Section 1 (stage 3).

[64] PW1, Datuk Michael Ting confirmed during cross-examination that the whole of Section 1 was not fully completed. There was no certification by the plaintiff's own consultant confirming that the Section 1 works were substantially or practically completed.

Definition of 'completion'

[65] In any construction works 'completion' would mean that all the construction works agreed to have been undertaken are completed except for very minor *de minis* work not carried out (re: *Westminster City Council v J Jarvis & Sons Ltd and another* [1970] 1 All ER 943). Even though there are divergent views taken by the courts but essentially completion means the 'completion' of all the works that need to be done as agreed under the terms of the contract.

[66] 'Completion' would in essence mean that the project would be in a state of readiness for beneficial use or occupation by the employer even though that there might be some minor defects (re: *Hosier and Dickinson Ltd v P & M Kaye Ltd* [1970] 1 WLR 1611).

Practical completion

[67] Under the principal agreement the CPC will be issued when the whole works have reached practical completion according to the terms of the agreement and to the satisfaction of the PD. Clause 48.2 of the principal agreement reads:

> When the whole of the Works have reached practical completion according to the provisions of this Contract and to the satisfaction of the PD, the date of such completion shall be certified by him and such date shall be the date of commencement of the Defects Liability Period as provided in Clause 47 hereof. The certificate issued under this sub clause shall be referred to as the 'Certificate of Completion'.

[68] In the principal agreement 'Practical Completion' was defined as 'the meaning ascribed to it in Clause 48.2, as limited by Clause 48.7 and Substantially Complete 'and Substantially Completed shall be construed accordingly'.

[69] Clause 43(a) of the same agreement stipulated that the 'The whole of the Works shall be Substantially Completed by the Date of Substantial Completion'.

Substantial completion

[70] Learned SFC for the defendant argued that Section 1 works failed to achieve practical completion to the satisfaction of the PD as required under cl 48.2. The plaintiff however, claimed that they had in fact completed 98.81% of Section 1 and 94.17% of the whole works.

[71] The High Court judge was of the considered view that the plaintiff had achieved substantial completion of the Section 1 works based on the evidence of PW1 and PW2. In her written judgment she was satisfied that the plaintiff had proven that it had substantially completed the Section 1 works by the due date of completion. PW2 is a quantity surveyor by profession and the plaintiff's contract manager. Prior to joining the plaintiff he was employed with KLIACS from 2002–2010. He was familiar with the facts as he was involved in the project when he was with KLIACS. PW1 and PW2 referred to the records of the weekly and monthly meetings where the levels of completion were discussed to come to the conclusion that the plaintiff had achieved substantial completion.

[72] PW2 had calculated the percentage of completion and produced a copy of the sectional physical progress as at 30 April 2012 which showed an achievement of 98.81%. He explained that the format was computed based on the overall physical works progress that was reported to KLIACS in the progress weekly reports as well as the monthly reports. The percentage of section progress for Section 1 was derived by reapportioning the works items under overall physical works to reflect the actual works that fall within Sections 1, 2 and 3.

[73] The High Court judge accepted the format calculated by PW2 as she found the format and the mode of calculation adopted were reasonable and fair. Her Ladyship rejected the defendant's argument that the plaintiff was not entitled to the CPC as there were no evidence that the PD was satisfied that Section 1 works had achieved practical completion.

[74] There was a request for certificate of substantial completion by the plaintiff but the request was addressed to the Minister of Transport dated 23 May 2012 (re: p 1667 *RR Jld* 2(8)). Nevertheless, KLIACS responded vide a letter dated 25 May 2012 and issued the CNC pursuant to cl 47 and appended the list of outstanding works. Even as at 28 May 2012 there were still outstanding works.

[75] We found that the learned judge, with respect, had failed to give any or adequate consideration to the contemporaneous documentary evidence evidencing the progress of the works. Instead undue weight had been accorded to the oral evidence of one witness, PW2.

[76] In his testimony PW2 explained that the format was computed based on the overall physical works progress reported to KLIACS through weekly progress reports and monthly reports. He had admitted that he prepared the summary for the purposes of the court's hearing. The plaintiff had not communicated with the defendant nor even submitted any of the reports to the defendant showing that as at 30 April 2012 98.81% of the Section 1 works was completed. PW2 told the court that he prepared the summary based on the overall physical works progress reported to KLIACS in progress weekly reports and monthly reports. However, the relevant progress weekly reports and monthly reports that he had referred and applied for the purposes of the preparation of the summary of sectional physical progress were not specifically referred nor adduced as evidence by the him to support his computation. PW2 admitted in his evidence that he did not submit the summary to KLIACS for verification. He also admitted that he did not attend the final meeting with KLIACS on the progress of the work. During cross-examination PW2 had testified that there was in fact a request from KLIACS for the plaintiff to submit progress reports for all the sections but this was not done.

[77] Under the principal agreement CPC will only be issued under the following circumstances:

(a) whole or total works reached substantial completion; and

(b) the PD must be satisfied that the whole or total works have achieved substantial completion.

[78] In the instant case based on the facts and evidence KLIACS had clearly indicated in their letter dated 28 May 2012 that CPC could not be considered as the plaintiff had failed to achieve substantial completion.

[79] The burden of proof is on the party seeking the claim to prove the facts. His Lordship Mohamed Dzaiddin SCJ (as he then was) in the case of *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627; [1994] 3 CLJ 1 said:

> ... The mere fact that the summary of the particulars were made could never be taken as proving that the contents were correct. It has to be proved by calling the maker to explain the facts and the basis of the calculation of the amount claimed. Moreover, the record book upon which the maker based her summary must be in evidence ...

[80] PW2 was the maker of the summary but the summary was not supported by any other evidence oral or documentary. Since the plaintiff alleged they had substantially completed the works, they bore the burden of proof. Section 101 of the Evidence Act 1950 is clear and relevant to support this point of law that 'He who asserts must prove'. No other witness gave evidence to support the calculations prepared by PW2.

[81] With respect the learned High Court judge erred when as she relied on the summary of sectional physical progress prepared by PW2 to conclude that the plaintiff had achieved substantial completion. In short there was judicial misappreciation of the evidence as a whole. The percentage 98.81% was based on PW2's own computation which was not verified by KLIACS as required by cl 14(2)(b) of the principal agreement nor supported by any documentary proof. The plaintiff failed to adduce any other documentary evidence to support the claim that the plaintiff had substantially completed the Section 1 works as envisaged under the principal agreement and the SA.

The Kota Kinabalu International Airport (KKIA) was allowed to operate on a 24-hour basis

[82] The plaintiff contended that Section 1 works were practically completed on 30 April 2012 as KKIA was operational on a 24-hour unrestricted basis as at 1 May 2012. The reopening of the KKIA on an unrestricted basis was approved by the relevant authorities such as Department of Civil Aviation ('DCA'). The learned judge accepted PW1 and PW2's evidence that this would not be possible if Section 1 works were not practically completed.

[83] Learned SFC for the defendant submitted that the KKIA was allowed to operate on an 24-hour unrestricted basis because the defendant did not want any further interruption to the operation of the airport after 30 April 2012 due to delay in the completion of the project. KKIA was operating on 24-hour basis even before 30 April 2012. The project is a redevelopment project on an existing airport and the approval by DCA was based on technical and safety aspects of the airport.

[84] We were of the view that the fact that the airport was operational on 24-hour basis should not be the basis to determine that the plaintiff had achieved practical completion as envisaged by the parties when the SA was executed.

Performance bond

[85] The plaintiff failed to achieve substantial completion and to complete both Sections 2 and 3 works. The learned High Court judge was correct to order the return of the balance 50% of the performance bond.

CONCLUSION

[86] Having carefully perused the appeal record and considered the respective submissions of the parties, we were of the opinion that the learned High Court judge fell into serious error with regard to Her Ladyship's findings.

[87] On those grounds and for the other reasons discussed and elaborated above, the Civil Appeal No W-01(C)(W)-5–01 of 2015 was allowed with costs and the order of the High Court was set aside. The Civil Appeal No W-01(C)(W)-6–01 of 2015 was dismissed with costs. We allowed the total costs of RM90,000 here and below subject to payment of allocatur fees for both appeals. The deposits for both the appeals were refunded.

Appellant's appeal allowed and respondent's appeal dismissed.

Reported by Ashok Kumar